Toward Taping

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I. INTRODUCTION

Numerous authors, from all points on the political spectrum, have advocated that police interrogations be taped.[1] But police rarely record custodial questioning, at least in full, and only a handful of courts have found this failure objectionable.[2] This commentary outlines three different constitutional grounds for mandating that such recording become a routine practice.

To set up the constitutional arguments, I first outline why taping is needed despite the elaborate rules that now govern interrogation. Put simply, the reasoning is as follows: the *Miranda* regime has failed, voluntariness should once again be the focal point of interrogation regulation, and taping is necessary to push courts in that direction. I then explain why a taping requirement should be more than a policy preference. To date, the primary contention in this vein has been based on the due process duty to preserve exculpatory evidence. Although that argument has not fared well in the courts, I think it can be recast more persuasively and try to do so here. I also put forward two other constitutional grounds for a taping requirement: the Fifth Amendment privilege against self-incrimination, with an emphasis on how it functioned in colonial times, and the Sixth Amendment right of confrontation, as distinct from the right to counsel. If one of these arguments can win the day, it will revolutionize the interrogation process much more radically than did *Miranda*.

II. *MIRANDA*'S MIRAGE

Miranda v. Arizona[3] is a hoax. By now the story is a familiar one. Contrary to the predictions of *Miranda*'s enemies and the hopes of its proponents, the warnings regime established by that case has had very little impact on the way police conduct interrogations. Confessions continue at virtually their pre-*Miranda* pace.[4] More

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1 *See, e.g.*, Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 489–92 (1996); Welsh S. White, *False Confessions and the Constitution: Safeguards Against Untrustworthy Confessions*, 32 HARV. C.R.-C.L. L. REV. 105, 153–55 (1997).

2 *See infra* text accompanying notes 30–32 & 44.

3 384 U.S. 436 (1966).

4 For a thorough review of the research and differing interpretations of it, see George C. Thomas III, *Plain Talk About the* Miranda *Empirical Debate: A "Steady-State" Theory of Confessions*, 43 UCLA

importantly, *Miranda* has had little effect on police behavior during interrogation. The best evidence for this conclusion is that the Inbau & Reid manual against which the *Miranda* majority inveighed thirty-five years ago, now in its fourth edition with two new authors,[5] is virtually unchanged. It still advocates use of the Mutt & Jeff routine, the pretended friend technique, exaggeration and falsification of evidence, and all the other horribles described by Chief Justice Warren in *Miranda*.[6]

Worse still is that *Miranda* may act as a cover for all of this, by leading to judicial myopia about voluntariness, supposedly the ultimate issue in interrogation regulation. Many have noted that once the warnings are given and a "valid" waiver obtained, courts are extremely likely to find confessions "voluntary."[7] And this immunizing effect may not be the only way *Miranda* has (inadvertently) sabotaged the voluntariness inquiry. By shifting the constitutional foundation of interrogation analysis from due process and "fundamental fairness" to the Fifth Amendment and compulsion,[8] *Miranda* seems to have made it easier for courts to ignore police tactics that rely on trickery rather than coercion.[9] The decision that decried the false friend

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L. REV. 933, 953–59 (1996) (concluding that the post-*Miranda* confession rate is most likely somewhere between 52% and 55%, whereas pre-*Miranda* rates were in the 45% to 60% range).

[5] FRED E. INBAU, JOHN E. REID, JOSEPH P. BUCKLEY & BRIAN C. JAYNE, CRIMINAL INTERROGATION AND CONFESSIONS (4th ed. 2001).

[6] *Compare id.* at 240–98 *with* Miranda, 384 U.S. at 448–55.

[7] Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 744–45 (1992) (stating that *Miranda* may have "served to insulate the resulting confessions from claims that they were coerced or involuntary."); George C. Thomas III, *The End of the Road for* Miranda v. Arizona*?: On the History and Future of Rules for Police Interrogation*, 37 AM. CRIM. L. REV. 1, 18 (2000) ("Once a suspect waives *Miranda* (and most do), routinized *Miranda* ritual lulls judges into admitting confessions with little inquiry into voluntariness."). Welsh White could find only nine cases in a recent two-year period in which confessions obtained after a waiver were excluded, and four of these were based on state constitutional grounds. White, *supra* note 1, at 1219 n.54. White concluded that "[a] finding that the police have properly informed the suspect of his *Miranda* rights thus often has the effect of minimizing or eliminating the scrutiny applied to post-waiver interrogation practices." *Id.* at 1220.

[8] Although the current Court essentially equates "voluntariness" with lack of coercion, pre-*Miranda* cases focused on an independent "fairness" concern as well. *See* Paul M. Bator & James Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 73 (1966) ("[T]he concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice.").

[9] As a practical matter, voluntariness analysis under the due process clause and waiver analysis under *Miranda* have been virtually identical when it comes to deception. *See* MCCORMICK ON EVIDENCE 230 (5th ed. 1999) ("Lower courts have generally not distinguished between the impact of deception on voluntariness as a general requirement and on the effectiveness of waivers."). But holdings like those in *North Carolina v. Butler*, 441 U.S. 369 (1979) (holding that confusion over effect of refusal to sign waiver form does not render *Miranda* waiver invalid) and *Colorado v. Spring*, 479 U.S. 564 (1987) (holding that confusion over focus of interrogation does not render *Miranda* waiver invalid) are easier when the focus is whether the police tactics "compel" rather than whether they are "fair." *Cf. Miranda*, 384 U.S. at 507 n.4 (Harlan, J., dissenting) (describing law of voluntariness as invalidating interrogation methods viewed as "repellent to civilized standards of decency").

technique, in all its forms, at the same time provided the conceptual basis for declaring it legal, because deception is often not coercive.[10] *Miranda*'s focus on compelled self-incrimination rather than fairness may also have encouraged courts to be more accepting of police promises of leniency[11] and more dismissive toward claims of untrustworthiness.[12] Although these developments are not illogical, given the fact that neither scenario is necessarily correlated with obvious coercion, it is worth noting that together they comprised the principal focus of pre-*Miranda* voluntariness analysis in its early days.[13]

Miranda has probably not even had much impact on physical abuse in the interrogation room. Amnesty International has described scores of cases—some of them during the 1970s (when *Miranda* should have been in its heyday) and some more recent—in which confessions were obtained through beatings, torture, and use of four-point restraints.[14] *Threats* of beatings and the like are presumably even more common. This kind of brutality has probably been reduced in the past 35 years. But if so, *Miranda* had little to do with that reduction; rather it is part of a long-term trend resulting from public distaste for the third degree, the movement toward police professionalization, the proliferation of excessive force damages actions, and pre-*Miranda* decisions outlawing physical force during interrogation.[15]

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[10] *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 823 (1989).

[11] *See* MCCORMICK ON EVIDENCE 400 (John W. Strong ed., 3d ed. 1984) (based on a reading of cases in the 1970s and early 1980s, speaking of "the general increasing distaste for a rigid requirement that a promise render a confession inadmissible").

[12] *See* Colorado v. Connelly, 479 U.S. 157 (1986) (holding that weakly corroborated statements from a person suffering from delusions were admissible because not "compelled" by the police). *Connelly* also held that the confession was admissible under the due process clause, but that holding seems inconsistent with prior due process holdings, and therefore influenced by *Miranda*'s emphasis on compulsion. *See* George E. Dix, *Federal Constitutional Confession Law: The 1986 and 1987 Supreme Court Terms*, 67 TEX. L. REV. 231, 305 (1988) (*Connelly* failed "to acknowledge either the reliability-assuring function of the due process guarantee or the line of cases construing due process as prohibiting the use of unreliable evidence in criminal prosecutions.").

[13] Hopt v. Utah, 110 U.S. 574, 585 (1884) ("But the presumption upon which weight is given to [a confession], namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise . . . ."); Yale Kamisar, *What is an "Involuntary" Confession? Some Comments on Inbau and Reid's* Criminal Interrogation and Confessions, 17 RUTGERS L. REV. 728, 743 (1963) (arguing that false confessions were the courts' main concern when applying the voluntariness test); *see also supra* note 11.

[14] AMNESTY INTERNATIONAL, USA: A BRIEFING FOR THE UN COMMITTEE AGAINST TORTURE 14–15 (May 2000) (describing cases in Chicago, Alabama, and Tennessee, involving torture, beatings, use of an electric cattle prod, death threats, and four-point restraints); *see also* Susan Bandes, *Patterns of Injustice: Police Brutality in the Courts*, 47 BUFF. L. REV. 1275, 1278 (1999) ("[I]n many significant respects, what happened [in the Chicago cases described by Amnesty] represents business as usual in Chicago and throughout the United States.").

[15] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 326 (Benjamin I. Page ed., 1991) ("Evidence is hard to come by but what evidence there is suggests that any reductions that have been achieved in police brutality are independent of the Court and started before

If, as the *Miranda* majority assumed, American interrogation practices in the 1960s needed to be revamped, then they still need to be revamped today, despite over four decades of *Miranda*.

III. VALIDATING VOLUNTARINESS

One way to revitalize regulation of interrogation is to get the courts re-interested in the "voluntariness" inquiry. Admittedly, figuring out what voluntariness means presents a larger than average problem. Welsh White well summarized the situation when he noted that "the statement that a defendant's will was overborne is essentially a legal conclusion, rather than simply an empirical judgment."[16]

For those hoping for more regulation of interrogation, however, this type of indeterminacy does not have to spell defeat. Indeed, it can be turned to advantage. The fact that we cannot know definitively when a confession is "involuntary" should become the rationale for seeking *per se* rules (White's "legal conclusions") telling us when the interaction of police behavior and suspect characteristics leads to involuntary statements. Without such rules, courts are wallowing in quicksand with no means of escape. That, after all, was the motivating insight behind *Miranda* itself (and behind the subsequent case of *Edwards v. Arizona*[17]). The Supreme Court's mistake was in assuming that two rules would do the trick.

I make no attempt to flesh out a law of voluntariness here, except to make note of three sometimes neglected sources of information that could prove useful in that endeavor. First, moral theory can provide a framework for thinking about voluntariness in the interrogation context. As Professor Mitchell Berman recently wrote, "scholarly efforts over the past few decades have substantially advanced our understanding" of coercion.[18] Empirical work can also provide eye-opening information for courts grappling with the voluntariness issue. Research conducted

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Miranda."); Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. CRIM. L. & CRIMINOLOGY 429, 433 n.10 (1998) (stating that as early as the 1930s, "[g]rowing public revulsion toward third-degree practices, the movement toward police professionalization, and Supreme Court decisions outlawing physical force during interrogation eventually led to a shift to psychological tactics").

[16] Welsh S. White, *Confessions Induced by Broken Government Promises*, 43 DUKE L.J. 947, 950 (1994). The best example of this phenomenon is the fact that courts are more willing to find involuntary those confessions that are induced by promises considered to be "false." MCCORMICK ON EVIDENCE, *supra* note 9, at 228–29. False promises are no more likely to overbear one's will than true promises since, by definition, the suspect doesn't know which is which. But the courts' "legal conclusion" is that the difference is crucial in deciding voluntariness.

[17] 451 U.S. 477, 487 (1981) (holding that a request for counsel requires the termination of questioning).

[18] Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45 (2002) (citing, among others, ALAN WERTHEIMER, COERCION (1987), JOEL FEINBERG, HARM TO SELF 189–268 (1986), and Peter Westen, *"Freedom" and "Coercion"–Virtue Words and Vice Words*, 1985 DUKE L.J. 541).

over the past thirty years provides insights into the police techniques most likely to cause false confessions,[19] the most common misunderstandings about the warnings and the interrogation process, and the types of people most likely to misunderstand them.[20] A final source of ideas worth considering comes from foreign countries. For instance, England, in its Police and Criminal Evidence Act of 1984, has developed a detailed set of rules for interrogation, including standards regarding breaks, food and other amenities.[21] German law explicitly prohibits affirmative misrepresentations by the police, while permitting police to leave misimpressions uncorrected unless the misimpressions are about the law.[22]

Again, my aim here is not to detail what the law of voluntariness might look like, but to point out that nuanced development of that law is possible.[23] The next challenge is to motivate courts to move in that direction. One possible way of doing so is to eliminate *Miranda*.[24] If, as suggested above, proof that warnings were given often ends the judicial inquiry into the conduct of an interrogation, then courts might well adopt a stricter view of voluntariness once warnings are de-emphasized. But the Court's recent decision in *United States v. Dickerson*[25] is pretty good evidence that *Miranda* will never be reversed. Furthermore, pre-*Miranda* case law suggests that giving up on a warnings requirement could backfire.[26] Most importantly, *Miranda* cannot be blamed for *all* of the courts' resistance to a rigorous voluntariness inquiry. There are deeper reasons—including concern about the difficulty of judicially devising a real law of voluntariness and acquiescence stemming from a crime control outlook—that might lead courts to prefer an essentially hands-off approach to the issue.

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[19] Welsh S. White, *What is an Involuntary Confession Now?*, 50 RUTGERS L. REV. 2001 (1998).

[20] THOMAS T. GRISSO, JUVENILE WAIVER OF RIGHTS (1981); Morgan Cloud et al., *Words Without Meaning: The Constitution, Confessions and Mentally Retarded Suspects*, 69 U. CHI. L. REV. 495 (2002).

[21] CODE OF PRACTICE FOR THE DETENTION, TREATMENT AND QUESTIONING OF PERSONS BY POLICE OFFICERS §§ 8.6, 12.2 (1999).

[22] Thomas Weigend, *Germany Rules of Criminal Procedure, in* CRAIG BRADLEY, CRIMINAL PROCEDURE: A WORLDWIDE STUDY 202–03 (1999). Germany also prohibits questioning of inmates by undercover agents. Richard S. Frase & Thomas Weigend, *German Criminal Justice: A Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 333, 336–37 (1995).

[23] Professor White has made an excellent beginning to this enterprise. *See* WELSH S. WHITE, MIRANDA'S WANING PROTECTIONS 190–95, 201–14 (2001) (describing a number of "pernicious" interrogation practives that are likely to move innocent suspects to incriminate themselves); *see also* White, *supra* note 19.

[24] *See* Alfredo Garcia, *Is* Miranda *Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461, 504 (1998) ("[S]ince *Miranda* serves primarily as a useful adjunct to law enforcement, the police ought not be able to hide behind its false beneficence.").

[25] 530 U.S. 428 (2000).

[26] *See* Crooker v. California, 357 U.S. 433, 438–40 (1958) (interrogator's refusal to honor suspect's request to confer with counsel does not make confession involuntary); Cicenia v. LaGay, 357 U.S. 504, 508 (1958) (reiterating the Court's holding in *Crooker*). *But see* Haynes v. Washington, 373 U.S. 503 (1963) (refusing to honor repeated requests to call wife made confession involuntary).

If an additional push—beyond the nudge that might come from aggressive advocacy using philosophy, empiricism, and comparative law—is necessary to get courts to look more closely at the voluntariness notion, it is most likely to come from exposure to the facts. In the Fourth Amendment context, I have argued for a damages remedy in place of exclusion, in part because the exclusionary rule has the unfortunate effect on the judicial mind of equating the Fourth Amendment with guilty people.[27] The analogous problem in the confessions context is that voluntariness arguments almost always appear to be made by criminals trying to evade the consequences of their own statements. The only way to get trial courts, and through their findings the appellate courts, to think twice about blithely admitting confessions obtained through promises, cajolery and deception is to make them graphically aware of how those techniques can dehumanize everyone involved in the interrogation, whether they are guilty, innocent, or the police themselves.

IV. THE BASIC ARGUMENT FOR TAPING

Justice Harlan was right when he stated that *Miranda* provides little aid in figuring out how police and suspects interact during interrogation.[28] Taping is one obvious solution to that problem. Taping has other advantages as well. It can provide proof against false accusations aimed at the police, professionalize the interrogation process, and preserve the details of statements that might come in handy later, all of which has been shown to increase guilty pleas.[29]

Yet most police departments still do not tape interrogations.[30] Those that do use it sporadically and at their discretion, and very often tape only the end result of the interview process—the admission.[31] Even the FBI, normally the epitome of professionalism, has refused to adopt a taping requirement.[32]

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[27] Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 402–05.

[28] *Miranda*, 384 U.S. at 505 (Harlan, J., dissenting) ("Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers.").

[29] William A. Geller, *Videotaping and Confessions*, *in* THE MIRANDA DEBATE: LAW, JUSTICE AND POLICING 303, 307–09 (Richard A. Leo & George C. Thomas III eds., 1998). Taping can also help empiricists determine the factors that contribute to confessions, false and otherwise.

[30] *Id.* at 303 ("It is estimated that in 1990, about one-sixth of all police and sheriffs' departments in the United States . . . videotaped at least some interrogations or confessions.").

[31] *Id.* at 306; *see also* Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let's Try Video Oversight*, 34 J. MARSHALL L. REV. 537, 553 (2001) ("Some departments, including Chicago, have taken the shortcut of recording only the end result of the interrogation."); David Dixon & Gail Travis, *The Audio-Visual Recording of Police Interrogation in New South Wales*, *in* CRIMINAL LAW 43–44 (Darryl Brown et al. eds., 2001) (on file with author) (recounting that 73.6% of suspects were subject to some pre-taping interviewing and that many taped interviews "begin with the lengthy adoption of questions and answers recorded in traditional style in an officer's notebook").

[32] FEDERAL BUREAU OF INVESTIGATION LEGAL HANDBOOK FOR SPECIAL AGENTS §§ 7–14 (discouraging recording of interviews) (*cited in* Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223, 229 n.35 (2000).

Given the benefits of recording, it is hard to shake the feeling that this reticence about taping stems from the desire to hide something from the courts. As Richard Leo notes, the usual explicit government objections to a taping requirement are easily parried. The cost of videotaping is more than made up for by the savings from dispensing with "corroboration officers" and the reduction in suppression hearing challenges from defendants who know the tape will expose their lies about what happened at the stationhouse.[33] In a day when municipalities are spending thousands of dollars on scores of closed circuit TVs for the purpose of monitoring the public streets,[34] paying for a camera in the interrogation room is unlikely to break the budget. Nor are suspects intimidated into silence by the cameras. They usually forget they are even there.[35] Finally, good faith failures to tape (due to equipment failure or other unforeseen circumstances) should not be grounds for sanction.

A more potent objection to taping is that it will function just like *Miranda* has: as a cover for improper police work. Tapes can be doctored. Much more likely (because not as obviously illegal) is the pre-interrogation interrogation. Conducted at the place of arrest, in the patrol car, or even in the interrogation room before the tape is turned on, this interview is designed to get the "cat out of the bag" before the official interrogation takes place. Either of these maneuvers might allow police to obtain an involuntary confession without fear it will be memorialized on tape.

These circumventions can be finessed, however. Tape manipulation can be deterred by strict chain of custody rules, or by giving the suspect a tape of the interview after it is completed (the latter a practice in New South Wales, Australia[36]). Off-the-record shenanigans can be diminished by requiring that all questioning be taped,[37] or at least by stipulating that all questioning in the stationhouse take place on tape (as is mandated by English law[38]) and that only statements that are made on tape are admissible (which is the rule in some Australian jurisdictions[39]). If the suspect is

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[33] Richard A. Leo, *The Impact of* Miranda *Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 687 (1996).

[34] *See* Christopher Slobogin, *Public Privacy: Camera Surveillance of Public Places and the Right to Anonymity*, 72 MISS. L.J. 213, 220–21 (2002) (describing proliferation of closed circuit TV use by police).

[35] *See* Michael McConville & Philip Morrell, *Recording the Interrogation: Have the Police Got It Taped?*, 1983 CRIM. L. REV. 158, 159–60.

[36] *See* Dixon & Travis, *supra* note 31 (describing New South Wales procedure that produces one videotape and three audio tapes of each interrogation, with one of the latter being given to the suspect); *see also* § 570D Criminal Code (Western Australia) (requiring police to give defendant a copy of the videotape).

[37] Even courts that are friendly toward a taping requirement have been hostile to this extra requirement. In 2002, the Minnesota Supreme Court held that its holding in *State v. Scales*, 581 N.W.2d 587 (Minn. 1994), to the effect that untaped statements made during custodial interrogation are not admissible, would not be extended to noncustodial interrogations. *See* State v. Conger, 652 N.W.2d 704, 708–09 (Minn. 2002). It also pointed out that this stance was consistent with the law of Alaska and Texas, the only other states with a taping requirement. *Id.*

[38] Police and Criminal Evidence Act, 1984, § 60 (Eng.).

[39] Police Powers and Responsibilities Act, § 263(3) (Queensland); § 74E Summary Offences Act

told of the latter rule at the outset of the taping, the cat-out-the-bag phenomenon would be further ameliorated.[40]

Again, here in the United States police are not likely to develop such rules themselves and, with two exceptions, legislatures have been moribund in this area.[41] What is needed is a *constitutional* rationale for rules like this, one that would at least be persuasive in state, if not in federal, court. Such a rationale could come from at least three different constitutional provisions—the Due Process Clause, the Fifth Amendment Privilege Against Self-Incrimination, and the Sixth Amendment Right of Confrontation.

All three arguments are strong, if we adopt two assumptions. First, an exact accounting of interrogation events—from the way the warnings are given to the precise nature of any threats, promises, and deceptions that occur—is needed to determine whether statements are voluntary in the totality of the circumstances. Second, this kind of record is very difficult to generate solely from testimony by the police and the suspect, even if we assume that they try to be honest. As the Alaska Supreme Court stated in *Stephan v. State*, the first decision to require taping:

> It is not because a police officer is more dishonest than the rest of us that we . . . demand an objective recordation of the critical events. Rather, it is because we are entitled to assume that he is no less human—no less inclined to reconstruct and interpret past events in a light most favorable to himself—that we should not permit him to be a "judge of his own cause."[42]

The most direct support for the conclusion that voluntariness can only be assessed through a recorded account of the interrogation is the fact that we insist on transcripts in the analogous civil context. Prolonged face-to-face questioning of one party by the opposing party that is conducted with the goal of producing evidence for trial virtually always takes place at a deposition, and a deposition that is not recorded in some fashion is always inadmissible in evidence.[43] With this truism about

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(South Australia); § 464H Crimes Act (Victoria); § 570D Criminal Code (Western Australia); § 143 Police Administration Act (Northern Territory); § 108 Criminal Procedure Act (New South Wales).

[40] Of course, the Court has rejected an analogous requirement outside the taping context. Oregon v. Elstad, 470 U.S. 298, 316–17 (1985). But *Elstad* also recognized that if the earlier confession is the result of "real" coercion, then the second confession would also be inadmissible. *Id.* at 312–13. The point of the taping requirement is to give courts the information they need to determine whether coercion occurred at any point in the interrogation process.

[41] TEX. CODE OF CRIM. PRO., art 38.22, § 3 (1999) (oral statements during a custodial interrogation admissible only if electronically recorded); ILL. COMP. ST. 725 §§ 5/103-2.1 (West 2003) (statements of homicide suspects during custodial interrogation at places "of detention" inadmissible unless taped).

[42] 711 P.2d 1156 (Alaska 1985) (quoting Yale Kamisar, *Foreword:* Brewer v. Williams—*A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209, 242–43 (1977)). Of course, the same could be said for suspects as well.

[43] FED. R. CIV. P. 30(c) (requiring recording of deposition). Pretrial interviews of non-party witnesses are often more informal, but even here depositions are typical when the desire is to have

interrogation in civil cases in mind, it is stunning that we do not require verbatim transcripts of criminal interrogations, where the stakes are so much higher, access to information about psychological pressures so much more important, and legal representation (of either party) so much less likely.

These preliminary observations set the stage for a brief elaboration of the three constitutional reasons taping of interrogations should be required.

V. THE DUE PROCESS ARGUMENT

The due process argument for taping is that it is the only way the government can meet its obligation to preserve evidence that is exculpatory. As evidenced by the large number of courts that have rejected it,[44] this argument is not immediately persuasive. In *California v. Trombetta*[45] and *Arizona v. Youngblood*[46] the Supreme Court held that intentional failure to preserve forensic evidence or its intentional destruction violates due process only when the exculpatory value of the evidence is "apparent" (rendering the government in bad faith) and the defendant has no other way of reproducing comparable information. Most courts that have applied this rule to recording of interrogations point out that police seldom know when questioning will produce exculpatory evidence, even when that term is defined to include evidence of involuntariness as well as of innocence,[47] and that in any event the suspect can always tell the court his story about the interrogation. For instance, one court stated that a recording of the suspect's statements would only have been "potentially useful,"[48]

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testimony "available for use or confrontation at the trial; or to have the witness committed to a specific representation for such facts as he might present." Int'l Bus. Mach. Corp. v. Edelstein, 526 F.2d 37, 41 n.4 (2d Cir. 1975). *Edelstein* is considered a leading case on the permissibility of informal interviews for discovery purposes. *See* RICHARD L. MARCUS ET AL., CIVIL PROCEDURE: A MODERN APPROACH 392–93 (3d ed. 2000).

[44] *See* Donovan & Rhodes, *supra* note 32, at 232 n.52.

[45] 467 U.S. 479 (1984).

[46] 488 U.S. 51 (1988).

[47] One might object as a preliminary matter that the Due Process Clause cannot apply in this situation because an involuntary confession does not necessarily tend to prove factual innocence. One response is that at least some involuntary confessions are clearly false and can lead to inaccurate verdicts on guilt. *See* Leo & Ofshe, *supra* note 15, at 433 (reporting "a study of sixty cases of police-induced false confessions in the post-*Miranda* era"). More importantly, as even the courts that have been hostile to a taping requirement seem to recognize, the government's duty to provide exculpatory evidence has been defined more broadly than a simple focus on factual innocence. *See, e.g.*, United States v. Bagley, 473 U.S. 667, 682 (1985) (requiring disclosure of evidence when "there is a reasonable probability that, had the evidence been disclosed to the defense, *the result of the proceeding would have been different*") (emphasis added). As long as exclusion remains the remedy for involuntary confessions, the *Bagley* test will be met whenever the government withholds information tending to show involuntariness. Imagine, for instance, that the suspect confesses to a crime he committed, but only after (unknowingly) being drugged. Most courts would presumably consider the fact of drugging "exculpatory" in the *Bagley* sense, even though the confession is accurate.

[48] Holloway v. Horn, 161 F. Supp. 2d 453, 530 (E.D. Pa. 2001) (quoting *Trombetta*, 467 U.S. at 486).

rather than obviously relevant to an involuntariness challenge, and another pointed out that "[l]ack of an electronic recording did not preclude the defendant from challenging the accuracy of the officers' recollection of the interrogation."[49]

The first point misconceives the nature of the police malfeasance in failing to tape. While many interrogations undoubtedly are conducted properly, we cannot be sure that conclusion is warranted with respect to a particular interrogation until a court says so. And given the assumptions made above—which together hold that verbatim records are necessary for voluntariness assessments—a court *cannot* say so until it has viewed the tape. Accordingly, failing to tape a confession is worse than destroying forensic evidence that has been tested (the situation involved in *Trombetta*[50]). At least in the latter situation an objective analysis of the blood, semen or hair has taken place before the evidence is destroyed; when an interrogation is not taped, in contrast, objective analysis of voluntariness can *never* occur. In short, failure to tape an interrogation is failure to preserve evidence which is crucial to determining the outcome of trial, and when intentional (as it will be if taping was possible) should be considered bad faith.

Protesting that defendants can make their exculpatory case without a tape is also unpersuasive, if one adopts the assumptions made above. Absent a tape, courts are forced to rely on the incomplete and biased accounts of the parties, which is an insufficient basis for assessing voluntariness. It was this reasoning, more or less, that proved persuasive to the Alaska Supreme Court in *Stephan*, which based its decision primarily on due process considerations (albeit derived from the Alaskan constitution rather than the federal one).[51] To the same effect are the many lower court cases that find inadequate as a constitutional matter verbal descriptions of lineups for purposes of reconstructing the identification process.[52] If lineups must be recorded for the defense, certainly interrogations, which involve psychological as well as physical events, should be.

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[49] State v. Godsey, 60 S.W.3d 759, 771 (Tenn. 2001).

[50] 467 U.S. at 481 ("[T]he question presented is whether the Due Process Clause requires law enforcement agencies to preserve breath samples of suspected drunken drivers in order for the results of breath-analysis tests to be admissible in criminal prosecutions."). Failing to tape an interrogation is also worse than allowing evidence to deteriorate before it is ever tested (the situation in *Youngblood*, 488 U.S. at 54), because in the latter situation the government presumably does not present either test results or the underlying forensic evidence. In the untaped interrogation context, on the other hand, the government is *relying* on the results of an interrogation it has failed to preserve adequately.

[51] Stephan v. State, 711 P.2d 1156 (Alaska 1985); *cf.* State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994) (adopting a taping requirement "in the exercise of our supervisory power to insure the fair administration of justice").

[52] *See, e.g.*, United States v. LaPierre, 998 F.2d 1460 (9th Cir. 1993) (videotape solely of lineup insufficient); People v. Curtis, 497 N.E.2d 1004 (Ill. 1986) (photograph required); Bruce v. State, 375 N.E.2d. 1042 (Ind. 1978) (requiring videotape of lineup); People v. Fowler, 461 P.2d 643 (Cal. 1969) (finding still photographs inadequate). These cases are based on the Sixth Amendment, discussed *infra*.

VI. THE FIFTH AMENDMENT ARGUMENT

If the *Miranda* regime is a prophylactic manner of implementing the right to remain silent, then a taping requirement appears to be even more so, for it would require police to tape not only "voluntary" unwarned statements, but even voluntary *warned* statements. *Dickerson* tells us, however, that rules that exclude noncompelled statements can still be constitutional rules.[53] More importantly, a taping requirement in contested cases is not as prophylactic as it seems, if viewed as a matter of *proof* rather than, as *Miranda* is viewed, as a means of deterring compulsion. The Supreme Court has held that the state must prove by a preponderance of the evidence that police gave warnings, that the suspect understood the warnings, and that any waiver of the rights incorporated in those warnings is voluntary and intelligent.[54] If one assumes that voluntariness cannot be assessed without taping, the tapeless prosecutor cannot meet that burden, at least where the defendant plausibly asserts he did not receive or understand warnings, was misled about them, or received improper threats, promises and the like. In such cases, at best the parties are in equipoise, and the party with the burden of proof—the government—should lose.

Ultimately, however, the Fifth Amendment claim is not based on logic, but on history. The drafters of the Fifth Amendment obviously did not contemplate that suspect questioning be taped. But their conception of interrogation and the method for proving what it produced involved something quite similar. Because organized police forces did not exist at the time,[55] interrogations in colonial times were always conducted by *judges*, during preliminary examinations in open court.[56] Assuming we are not going to move back toward that model,[57] the closest modern equivalent is a recording, presented to the judge. A historical perspective on the Fifth Amendment dictates that if the court is not going to conduct the questioning, it should at least

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[53] *See* Donald A. Dripps, *Constitutional Theory for Criminal Procedure*: Dickerson, Miranda, *and the Continuing Quest for Broad-But-Shallow*, 43 WM. & MARY L. REV. 1, 3 (2001) (after *Dickerson*, "the same statement might be deemed compelled [under *Miranda*] and not compelled [under the Due Process Clause] in the same case.").

[54] Colorado v. Connelly, 479 U.S. 157, 167–70 (1986) (explaining that the burden is on state to disprove both *Miranda* and due process violations by preponderance of the evidence).

[55] Roger Lane, *Urban Police and Crime in Nineteenth Century America*, *in* MODERN POLICING, 1, 5 (Michael Tonry & Norval Morris eds., 1992) (In the eighteenth and early nineteenth centuries, "[e]nforcement of criminal law . . . was largely the responsibility either of the community as a whole or of the individual victim of some offense, rather than something delegated to specialized agents of the state.").

[56] John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1059–60 (1994); Eben Moglen, *Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege Against Self-Incrimination*, 92 MICH. L. REV. 1086, 1099–104 (1994).

[57] For a suggestion in that regard, see Paul G. Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224 (1932); *see also* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 899 (1995).

receive a verbatim account of how the questioning went.[58]

VII. THE SIXTH AMENDMENT ARGUMENT

The confrontation argument derives from a right to counsel case, *United States v. Wade*.[59] In *Wade* the Supreme Court held that, under the Sixth Amendment, suspects placed in lineups after indictment are entitled to counsel. The Court's language, however, focused on confrontation concerns, not the need for a lineup lawyer per se. First, the Court suggested that the right it recognized could be met not only by the presence of an attorney, but also by provision of "substitute counsel,"[60] which presumably could include a recording of the lineup, as lower courts have recognized.[61] Second, the reason counsel or "substitute counsel" must be present at the lineup is that the accused would otherwise be "deprived of that right of cross-examination which is an essential safeguard to his right to confront the witnesses against him."[62] The "vagaries" of eyewitness identification during a lineup can only be effectively challenged, said the Court, if adequate observation of the identification process occurs.[63] In essence, the *Wade* Court adopted in the lineup context the same two assumptions I have adopted for the interrogation context. Interrogation is subject to even more vagaries than the lineup process, and counsel or a substitute—i.e., taping—is necessary to make sure we know about those vagaries.

Wade's right to counsel was subsequently limited to post-charging lineups,[64] and a right to taping, so limited, would be close to useless, since most interrogations take place before charging. But, again, the Sixth Amendment argument made here is not based on the right to counsel, but on the right of confrontation. And the Court has never limited the right of confrontation to events that occur post-charging. For instance, the Court has routinely applied the Confrontation Clause to exclude hearsay statements made well before any formal charging of the suspect takes place.[65] The

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[58] If history is to be the guide, we might also allow adverse inferences from silence, as was the case in colonial times. Amar & Lettow, *supra* note 57, at 899. But *Miranda* prohibited that inference, or at least banned the decision maker from drawing that inference post-warnings. *See* Doyle v. Ohio, 426 U.S. 610 (1976).

[59] 388 U.S. 218 (1967).

[60] *Id.* at 237.

[61] Although the Court in *Wade* was clearly referring to a human substitute, lower courts have been quite willing to include videotape as a substitute. *See* cases cited *supra* note 52.

[62] 388 U.S. at 235.

[63] *Id.* at 228.

[64] Kirby v. Illinois, 406 U.S. 682 (1972). One might also argue that *Wade*'s critical stage approach was overruled by *United States v. Ash*, 413 U.S. 300 (1973), which rejected a right to counsel at photo arrays. But the principal reason for the holding in *Ash* was that a photo array does not require the defendant to confront the "intricacies of the law and the advocacy of the public prosecutor." *Id.* at 309. This distinguishes it from interrogation, as *Ash* itself recognized. *Id.* at 312.

[65] For a recent example, see *Lilly v. Virginia*, 527 U.S. 116 (1999), where the Court held that a co-defendant's confession made before the defendant was charged was inadmissible against the defendant

rationale in those cases, like the rationale being advanced here for exclusion of untaped confessions, is that the state's evidence cannot be effectively challenged by the defense.

VIII. A NON-WAIVABLE "RIGHT"

Those are, in a nutshell, the three arguments for requiring the taping of interrogations. One last point needs to be made. Whether based on due process, the Fifth Amendment, or the right of confrontation, the taping requirement should not be waivable. If suspects could relinquish the right to be taped we can be assured that, just as 80% of those told of their *Miranda* rights waive them,[66] a large percentage of those informed that they have a right to a recording will give up that prerogative. Some will do so because police convince them taping is a bad idea, others because they mistakenly believe untaped confessions are inadmissible even when they forfeit the right, and others because they are coerced into waiver in subtle or not so subtle ways.

The insistence that taping occur regardless of the defendant's desires rests on more than concern for the constitutional rights of defendants, however. Government and society at large also have a strong interest in verbatim recording of interrogation, an interest that defendants should not be able to waive even if they can give rational reasons for doing so. A defendant may not be tried while incompetent, regardless of his or her desires, because society wants to ensure the integrity of the trial process and a meaningful confrontation between the accused and the accusers.[67] Similarly, the taping requirement should be sacrosanct because government should want to know precisely what happens in the interrogation room as a means of protecting the accuracy and fairness of the criminal process.[68]

IX. CONCLUSION

If the goal is effective regulation of the interrogation process, *Miranda* is not doing the job. A rejuvenated voluntariness analysis is much more likely to accomplish the task. That rejuvenation will take place only if taping of interrogations

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under the Confrontation Clause.

[66] *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of* Miranda, 43 UCLA L. REV. 839, 859 (1996) (83.7% waiver rate); Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 276 (1996) (78% waiver rate).

[67] Pate v. Robinson, 383 U.S. 375 (1966) (requiring trial court to inquire into competency any time there is a "bona fide" doubt on the issue).

[68] Two other issues that I leave unresolved are the appropriate remedy for a failure to tape and whether audiotape, as opposed to videotape, is sufficient. Although exclusion is the typical remedy, *see Stephan v. State*, 711 P.2d 1156, 1160 (Alaska 1985), I am agnostic about the remedy issue, if a viable damages remedy can be developed. *See* Slobogin, *supra* note 27, at 368–92. The *Wade* precedent is a strong argument for videotape, since audiotape is unlikely to be a sufficient "substitute" for counsel, but audiotape may be all that is reasonably available in some jurisdictions.

routinely occurs. And taping is likely to occur only if courts require it. This essay gives them three constitutional bases for doing so.

It should be recognized, however, that the regulatory regime proposed here could, like *Miranda*, easily be compromised. Failure to protect against pre-taping interviews or willingness to permit suspects to waive the "right" to a recording would significantly undermine a taping requirement. And of course, given its amorphous nature, there are all sorts of ways the voluntariness rule can be emasculated. If the courts are courageous enough to adopt this route they will have to be continually courageous to achieve any lasting impact.